BRIEF IN SUPPORT OF PETITION.

Statement.

The reference in the petition to the official reports of the opinions delivered in the Courts below, the statement of the grounds on which the jurisdiction of this Court is invoked, the statute involved, the statement of the case, and the specification of errors to be urged, all as set forth in the petition, are incorporated by reference into this brief.

Summary of Argument.

The ultimate question on this record is whether the provision for the maintenance of the wife made the gifts to charity so uncertain that the deduction cannot be allowed.

The deductibility of a remainder to charity depends on whether it is presently ascertainable at the date of the testator's death. If it is subject to no uncertainty appreciably greater than the general uncertainty that attends human affairs it is deductible.

The facts as found show that there was no such uncertainty that the charities will receive the full amount of the residuary gift, and therefore the deficiency tax was erroneously assessed and should be recovered.

The Court should grant the petition because the decision of the Court below is in conflict with the decisions of this Court, and in conflict with the decisions of Circuit Courts of Appeals in five other Circuits, and decides a question of Massachusetts law contrary to local decisions.

Argument.

1. The issue is whether the gift over to charity is so uncertain of realization that its value cannot be ascertained

for purpose of deduction from the gross estate for estate tax purposes. It results from the facts found by the trial Court, and is conceded in the opinions in the Circuit Court of Appeals that there is no appreciable uncertainty in fact that the charities will receive the gift in full. The possibility of a whimsical desire to destroy the charitable remainder, even if it could legally be entertained, cannot be inferred from the circumstances existing at the testator's death.

The basis of the opinions below is that the extent of the power given the wife to invade principal *by the terms of the will* makes the gift over uncertain as matter of law, irrespective of the facts. It is submitted that this is an erroneous conception of the law.

2. The law on this subject is stated in *Ithaca Trust Co. v. United States*, 279 U.S. 151. In that case there was a trust for the wife for life with a provision for use of principal and a gift over to charity, and the first question before the Court was whether the gift over was deductible or, as the Court put it, on page 154:

> "whether the provision for the maintenance of the wife made the gift to charity so uncertain that the deduction . . . cannot be allowed."

Under the terms of the will the wife could use the principal so far as "might be necessary to continue the comfort then enjoyed" and the determination of the amount to be so used was not left to her discretion. The Court did not confine its consideration to the phraseology of the bequest, but proceeded to consider the state of facts bearing upon the probability that the gift to charities would ultimately be received. The Court took into consideration the wife's standard of living and found that "the standard was fixed

in fact and capable of being stated in definite terms of money" (italics ours), and also the fact that the income was more than sufficient to maintain that standard of living. Thereupon the Court found as to the residuary gift that "there was no uncertainty appreciably greater than the general uncertainty that attends human affairs," and allowed the deduction.

It has been argued that the wording of the statute exempting "bequests . . . to or for the use of any corporation organized and operated exclusively for charitable purposes" (Revenue Act 1926, C. 27, 44 Stat. 9, as amended) confines the inquiry to the literal meaning of the words used in that part of the will creating the bequest; and that the *Ithaca* case "set a standard" in the sense of prescribing a definite form of bequest within which all charitable gifts must fall if they are to be exempted from taxation. An analysis of the decision, however, shows that the Court was not attempting to draw a printed form for a non-taxable charitable gift. The Court was not concerned with the definition of a testamentary provision, which is distinctly a matter of state law,

Lyeth v. *Hoey*, 305 U.S. 188,

but was dealing with a question of taxation involving an application of the revenue law to a certain state of facts. Application of federal tax laws depends on actualities and not on how state Courts characterize them.

Morgan v. *Commissioner*, 309 U.S. 78.

Taxation has been said to be "an intensely practical matter."

Farmers Loan & Trust Co. v. *Minnesota*, 280 U.S. 204.

Had the facts in the *Ithaca* case been different, for instance, had the income been insufficient for the required provision, so that principal must have been used, there can be no doubt that the Court would have found the gift uncertain and denied the deduction.

In the case at bar, if Mrs. Houghton had died before the testator or if her conservator had been appointed a few days earlier, or if she had been insane and legally incompetent to entertain any desire to invade principal, the existence in the will of a power to do so, however extensive, could not have destroyed the deductibility of the charitable gift.

In *United States* v. *Provident Trust Co.*, 291 U.S. 272, there was a trust for the daughter for life, then to her issue, and on her death without issue then to charities. As far as the language of the will was concerned, the gift over, being contingent on an indefinite failure of issue, would manifestly have been too uncertain for deduction (*Humes* v. *United States*, 276 U.S. 487). The Court, however, took into consideration the fact that the daughter had undergone an operation so that it was impossible that she could ever have a child. The contention was made that the language of the will alone must govern, and that evidence *in pais* could not be introduced to rebut the presumption that a woman of any age can have a child. The Court held, at page 285:

> "We have for consideration simply a statutory provision exempting from a prescribed tax the value of all bequests, etc., made to or for the use of charitable organizations and those which are akin, plainly evincing a legislative policy to encourage such bequests. *Edwards* v. *Slocum*, 264 U.S. 61, 63. And in that view we may well assume that Congress could not have meant to leave its aim to be diverted by a purely arbitrary assumption, which, whether applicable or not to *sustain* another or different policy would deny the truth and *subvert* the policy of this particular legislation."

In the case at bar it was found as fact, just as it was in the *Ithaca* case, that the standard of living was fixed in fact and was definitely ascertained in terms of money and that the income was largely in excess of what was needed or desired to maintain that standard (Plaintiffs' Requests for Findings of Fact Nos. 3 and 4, R. 34; granted, R. 41).

The trial judge in effect found that the only way in which invasion of principal need be apprehended was by a whimsical desire to destroy the charitable remainder and that it might be assumed that she would refrain from destroying his charitable gift by her mere whim (R. 40).

The majority opinion of the Circuit Court of Appeals grants that the likelihood of invasion was "extremely remote" (R. 117). The concurring opinion says that, practically "the remaindermen are at least as well assured, perhaps somewhat better assured of receiving the corpus intact upon the death of the life tenant" than in the *Ithaca* case (R. 121).

Yet that Court attempts to lay down a rule, in order to save litigation, that imposes an artificial and verbal test, in place of a simple issue of fact (R. 120, 122). It is submitted that such a rule is in contravention of existing law.

3. The principle of the *Ithaca* case, that the uncertainty affecting deductibility is a question of fact and not of form, has been followed in five Circuits.

In the Second Circuit:

> *Hartford-Connecticut Trust Co.* v. *Eaton,* 36 F. (2d) 710,

where the Court said "there was no reasonable possibility" of resort to principal.

> *City Bank Farmers Trust Co.* v. *United States,* 74 F. (2d) 692,

the latter case following

United States v. *Provident Trust Co.*, 291 U.S. 272.

In the Third Circuit:

Brown v. *Commissioner of Internal Revenue*, 50 F. (2d) 842.

In the Fifth Circuit:

First National Bank of Birmingham v. *Snead*, 24 F. (2d) 186,

where the Court said that impairment was barely possible but wholly improbable and that the possibility was so remote that to find that the charitable gifts were of no substantial value would be "arbitrary and unwarrantable."

In the Eighth Circuit:

St. Louis Union Trust Co. v. *Burnet*, 59 F. (2d) 922.

In the Tenth Circuit:

Commissioner v. *Bonfils*, 115 F. (2d) 788,

where the "possibility of invasion of corpus is so remote as to be negligible" and the Court said, on page 791:

> "The determination of this question turns on whether we should blindly adhere to the terms of the will which provide for recourse to corpus in the event income is insufficient to pay annuities, or whether we should be realistic and determine the effect of the terms of the will, in the light of the amount of the

corpus, the income therefrom, and the amount of the annuities. In other words whether we should give regard to mere theory or to actuality."

4. The opinion below relies on two decisions, *Humes* v. *United States,* 276 U.S. 487, and *Knoernschild* v. *Commissioner,* 97 F. (2d) 213.

The *Humes* case was not the case of a vested interest subject to possible impairment, but a gift over subject to a succession of contingencies as to which it could not be predicted which, if any, of them would ever occur. In the *Knoernschild* case the life tenant had power to use principal to give financial aid to her mother, brothers, and sisters, of whom several at least were living. The charitable gift over was of course impossible of definite ascertainment.

Neither of these decisions is inconsistent with the *Ithaca* case, or with the petitioners' contention. Neither is authority for the proposition that the surrounding circumstances are to be disregarded.

It is significant that, in view of the considerable amount of judicial authority on the subject, no stronger support for the Court's position could be found.

5. The Court held that it was not bound to "pass finally" on the question of Massachusetts law whether the life tenant could exercise her power to use principal from a whimsical desire to destroy the charitable remainder (R. 117). Yet it did in effect decide this question, and decided it contrary to local law, which attaches to any power however broad a fiduciary duty in its exercise.

Merchants Trust Co. v. *Russell,* 260 Mass. 162.
Dumaine v. *Dumaine,* 301 Mass. 214.
Cotton v. *Danville,* 301 Mass. 380, 385.

This additional error, however, does not become material if the Court grants this petition on the broader grounds already contended for.

6. The intent of Congress to encourage gifts to charity by making them deductible from the gross estate for estate tax purposes should not be defeated by reading into the law an artificial judicial limitation, destroying the legislative intent, by taxing a charitable gift.

United States v. *Provident Trust Co.*, 291 U.S. 272.

Conclusion.

The petitioners respectfully submit that their petition should be granted.

Respectfully submitted,

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